**Constitutional Law I**

**Spring 2022**

**Professor Mike Ramsey**

**Writing Assignment 1 (Separation of Powers)**

**Instructions:** *Answer the question below in a clear, well-organized essay of 1500 words or less. No research outside of the course materials is expected or permitted. You may take as much time as you like, but under exam conditions a question of this nature would likely be accorded about 1 hour to complete. At this point in the course, I recommend allowing 2 hours.*

*There is no ultimate “right” answer; the question has been deliberately written so that arguments are available on both sides, and your goal should be to identify and explain the best contending arguments. If you think additional facts are necessary or helpful to answer the question, you may include them in the discussion (but do not consider unlikely scenarios, scenarios which substantially alter or undermine the premise of the question, or facts contrary to those given). Be sure to consider fully both sides of the debate.*

*Your essay must be submitted to me via email prior to* ***10:00 am on Monday, February 14, 2022****.*

*This is a non-graded, credit/no credit assignment. I expect everyone to complete it, and I will impose substantial penalties, including ultimately a failing grade in the course, for failure to complete it.*

***Note****: This was an essay question on the 2014 final exam in Constitutional Law I.*

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In 2017, scientists discover a new element, named aerium, that is much lighter than air and (at least in theory) when purified, placed in small tanks, and attached to most objects will cause them to fly. Aerium is found trapped in deep underground pockets, especially in the western United States. Though practical applications have yet to be worked out, the consequences for both civil and military transport are potentially revolutionary. An enormous speculative boom-and-bust cycle develops, as speculators bid up the price of aerium (and aerium futures) in anticipation of commercial applications being developed, only to have the price collapse when a proposed application fails to materialize.

The U.S. Congress, concerned about the wild price swings, passes the Aerium Stabilization Act of 2017 (the “Act”), which authorizes the President for two years to take appropriate steps to establish a strategic aerium reserve and to buy and sell aerium to counter market fluctuations. President Elizabeth Warren has a very negative view of aerium as a threat to national security. She enters into executive agreements with Russia and China (the other main places where aerium is found) agreeing to suppress the private market in aerium. She then declares a “temporary” ban on private sales of aerium in the United States, pursuant to the agreements (Russia and China do so as well within their territory). Some congressmen object that the Act did not authorize suppressing private sales (just market stabilization), but the President says stabilization is impossible if private sales continue, and in any event, regardless of the Act, national security requires the ban. Congress as a whole does nothing.

When the Act comes up for renewal in 2019, an amendment is proposed to give the President express authority to ban private sales of aerium; it is defeated by a combination of members who think the President should not have this power and members who think the existing language already gives it to her. The Act is renewed for two more years without any change to its language and the President extends the ban on private sales for another two years. Although scientists continue to work on ways to use aerium, no successful application has yet been developed.

David Fry owns a ranch in Wyoming that has the sort of geology in which aerium deposits are typically found (although none has been found there yet). When the first speculative boom hit in 2017, his land was appraised at more than double its prior value. Now, however, it is unclear what it is worth, although probably much less than in 2017. He is still (legally) prospecting for aerium, but even if he finds some he won’t be able to sell it due to the President’s ban on sales. In 2020, Mr. Fry comes to you, as his attorney, to ask if he can successfully challenge the ban’s constitutionality. Write a memo assessing his chances. Consider what legal objections the President might raise, and how you would respond to them. Also consider what historical or current facts might be especially helpful or harmful to your case.

**[Note: assume the 2017 Act, as renewed, is itself constitutional. Use only constitutional law doctrines we have studied in this course. Do not consider the political question doctrine.]**